

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KARLOS L. FRYE, ) No. 08-5288 CW (PR)  
Plaintiff, )  
v. ) ORDER DENYING DEFENDANTS'  
OFFICER OLEACHEA, et al., ) MOTION TO DISMISS FOR FAILURE  
Defendants. ) TO EXHAUST ADMINISTRATIVE  
 ) REMEDIES; DENYING PLAINTIFF'S  
 ) MOTION FOR RECONSIDERATION;  
 ) REVIEWING AMENDMENT TO AMENDED  
 ) COMPLAINT; REQUIRING SERVICE  
 ) ON CERTAIN DEFENDANTS; AND  
 ) SETTING BRIEFING SCHEDULE  
) (Docket nos. 38, 43)

## INTRODUCTION

Plaintiff Karlos L. Frye is a state prisoner incarcerated at Salinas Valley State Prison (SVSP). On November 21, 2008, he filed this pro se civil rights action under 42 U.S.C. § 1983, alleging that SVSP officers violated his Fourth Amendment right to be free from unreasonable searches, his Eighth Amendment right to be free from cruel and unusual punishment, and his Fourteenth Amendment rights to procedural due process and equal protection.

On April 6, 2009, Plaintiff filed an amended complaint.

In an Order dated July 6, 2010, the Court reviewed the amended complaint and found Plaintiff alleged a cognizable Fourth Amendment claim against Defendant Oleachea<sup>1</sup> stemming from the strip searches conducted in December, 2007. Although the Court found Plaintiff also alleged a cognizable claim for deliberate indifference to his basic life necessities and a cognizable due process claim, both

<sup>1</sup> Defendant Oleachea's name was misspelled as "Oleshea" in the Court's July 6, 2010 Order. The Court directs the Clerk of the Court to correct the spelling of his name in the case caption to "Oleachea."

1 claims were dismissed with leave to amend because Plaintiff failed  
2 to identify "John Does" 1 through 6. Plaintiff's Fourteenth  
3 Amendment equal protection claim was also dismissed with leave to  
4 amend because he failed to allege facts showing that similarly  
5 situated inmates, who are not African-American, were not treated  
6 similarly. Plaintiff's claim relating to the grievance process was  
7 dismissed without leave to amend. However, the Court specified  
8 that it "would take into account Plaintiff's allegations if it  
9 needs to decide whether he can be excused from failing to exhaust  
10 his administrative remedies with respect to his other claims."  
11 (July 6, 2010 Order at 11.) Finally, the Court dismissed the  
12 claims against Doe Defendants without prejudice to allow Plaintiff  
13 to try to learn their identities and move to file an amendment to  
14 the amended complaint to add them as named defendants.

15 On November 23, 2009, Plaintiff filed an amendment to the  
16 amended complaint.<sup>2</sup> He has amended his Fourth Amendment, Eighth  
17 Amendment, due process and equal protection claims. He has also  
18 identified several Doe Defendants and adds the following as named  
19 defendants: SVSP Captain Muniz; SVSP Lieutenant W. Showalter; SVSP  
20 Sergeants M. Nilssen and Watson; and SVSP Correctional Officers  
21 Nolte, Lapurga, Milenewicz, Quitevis, Mora, Corona, Greeson, Newby  
22 and White. Plaintiff seeks monetary damages.

23 On December 11, 2009, the Court denied Plaintiff's motion for  
24 appointment of counsel.

25 Before the Court is Defendant Oleachea's motion pursuant to

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27       <sup>2</sup> Plaintiff sent a copy of his amendment to the Court;  
28 however, he did not send a copy to Defendant Oleachea's attorney.  
(Proof of Service dated Nov. 19, 2009.)

1 Federal Rule of Civil Procedure 12(b) to dismiss Plaintiff's  
2 complaint for failure to exhaust his administrative remedies as  
3 required by 42 U.S.C. § 1997e(a).

4 Plaintiff's opposition was due on April 9, 2010. To date,  
5 Plaintiff has not filed an opposition. Plaintiff was or should  
6 have been aware of the pending motion to dismiss because Defendant  
7 Oleachea served him with a copy of the motion on February 8, 2010  
8 at SVSP. (Proof of Service dated Feb. 8. 2010.) Furthermore, on  
9 February 9, 2010, August 11, 2010 and August 26, 2010, the Clerk  
10 sent Plaintiff copies of the docket sheet reflecting that the  
11 motion was filed, in response to his requests for a case status  
12 update. Plaintiff recently filed another request for a case status  
13 update, and in that letter dated September 21, 2010, he states: "I  
14 intend to make an opposition to the motion by the Defendants  
15 Oleashea [sic]." (Pl.'s Letter dated Sept. 21, 2010 at 1.) The  
16 Could construes this as a request for an extension of time to file  
17 his opposition to the motion to dismiss.

Plaintiff has also filed a motion to reconsider the Court's Order dated December 11, 2009 denying appointment of counsel.

For the reasons discussed below, Defendant Oleachea's motion to dismiss is DENIED. Plaintiff's motion to reconsider the Court's December 11, 2009 Order is also DENIED, and his request for an extension of time to file an opposition is DENIED as unnecessary.

## FACTUAL BACKGROUND

25 I. Facts Relating to the Alleged Constitutional Violations

26 In its July 6, 2009 Order, the Court summarized the facts  
27 alleged by Plaintiff as follows:

1           First, Plaintiff alleges that a prison official  
2 told him that his mother [Florine Frye] had been  
3 "observed . . . making suspicious movements" during a  
4 visit. (Am. Compl. at 3, 5.) Plaintiff's visit was  
5 terminated, and he was strip-searched twice. (Id.)  
6 Plaintiff alleges that SVSP Correctional Officer  
7 Oleshea [sic] led this search. (Id. at 3.)

8           Second, Plaintiff alleges that he was subjected to  
9 "inhumane savage cruelty and oppressive treatment"  
10 between 3 p.m. on December 2, 2007 and 1:30 p.m. on  
11 December 4, 2007. (Id. at 6.) During this time,  
12 Plaintiff was "on contraband watch," wearing only his  
13 underwear, which was taped to his bare skin. (Id. at  
14 5.) Plaintiff's legs and hands were handcuffed. (Id.)  
15 He was put in a cell containing only a small wooden  
16 bench. (Id.) He was "not given a short not mattress  
17 to sleep on and a bright light was kept on." (Id.)  
18 Because he was not provided with toilet paper, soap, or  
19 water, he was forced to clean himself after going to  
20 the bathroom with his bare hands. (Id. at 6.)  
21 Furthermore, he was not provided with utensils with  
22 which to eat, nor were his handcuffs removed, so he had  
23 to eat his food on his hands and knees "like a savage  
24 animal." (Id.)

25           Third, Plaintiff alleges that he was subjected to  
26 a "'feces watch' without . . . procedural due process,  
27 which is required before punishment of feces watch."  
28 (Id. at 8.) He argues that he was "entitled to a  
hearing within a reasonable time before and after the  
'feces watch' started." (Id. at 11.) Plaintiff also  
alleges that prison officials intentionally prevented  
him from exhausting his 602 inmate appeal, in violation  
of his Fourteenth Amendment right to due process. (Id.  
at 12.)

Finally, Plaintiff alleges that he was "targeted" for these actions, because he "is black and his fiancé is white." (Id. at 7.)

(July 6, 2009 Order of Service at 1-3.)

## II. Facts Relating to Exhaustion

The following facts relating to exhaustion are based on Plaintiff's verified amended complaint, the amendment and all his exhibits, as well as Defendant Oleachea's answer and the evidence he submitted in support of the motion to dismiss.

Plaintiff filed a 602 appeal form (original 602) dated

1 December 11, 2007 relating to: (1) the strip-search on December 2,  
2 2007; (2) the resulting three day "feces watch" on December 2, 3  
3 and 4, 2007; and (3) the alleged inhumane treatment during this  
4 period. (Amendment, Ex. A at 12-13, 602 Appeal Form dated Dec. 11,  
5 2007.)<sup>3</sup> There are no "DELIVERED" or "REC'D" stamps on the original  
6 602. (Id.)

7 Plaintiff mailed a duplicate 602 appeal form (second 602)  
8 dated December 26, 2007. (Amendment, Ex. A at 1-2, 602 Appeal Form  
9 dated Dec. 26, 2007.) The second 602 was stamped "REC'D DEC 31  
10 2007." (Id.)

11 On February 11, 2008, Plaintiff requested an interview with  
12 the appeals coordinator because he got back his original 602 on  
13 that date "with the word BYPASS STAMPED ON IT 4 TIMES and no dates  
14 and signatures of staff that received the 602." (Amendment, Ex. A  
15 at 8, Inmate Req. for Interview Form dated Feb. 11, 2008.) He then  
16 attached the original 602 with a request, stating: "Please sign the  
17 602 attached and provide your informed response as to the matters  
18 stated on the 602. You have 30 days to respond. Cal. Code Regs.  
19 tit. § 3084.6(b)(3)." (Id.)

20 On March 19, 2008, Plaintiff sent another request for an  
21 interview because he never received a response to his February 11,  
22 2008 request. (Amendment, Ex. A at 8 Inmate Req. for Interview  
23 Form dated Mar. 19, 2008.)

24 On April 19, 2008, Plaintiff sent a third request for an  
25 interview because he did not receive a response to his previous two

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26  
27 <sup>3</sup> On the original 602 form, Plaintiff stated: "See the  
Attached Sheets pages 3-6," referring to an attached four-page  
28 typewritten letter to the appeals coordinator dated December 11,  
2007. (Am. Compl. Ex. A.)

1 requests or to his two 602 appeals. (Amendment, Ex. A at 9, Inmate  
2 Req. for Interview Form dated Apr. 19, 2008.)

3 It is not clear from the pleadings when Plaintiff received his  
4 second 602 back; however, it was returned with a location and log  
5 number: "SVSP-D-01-0522."<sup>4</sup> (Amendment, Ex. A at 1-2, 602 Appeal  
6 Form dated Dec. 26, 2007.) It was stamped "BYPASS" at the informal  
7 and formal levels of review. (Id.) Under the second level of  
8 review, a box labeled "Granted" was marked, and it was stamped  
9 "RET'D MAR 18 2008." (Id.) Further, "1/1/08" was written in the  
10 blank for "Date Assigned," "2/1/08" in the blank for "Due Date,"  
11 and "3/1/08" in the blank for "Date Competed." (Id.) This section  
12 also includes the second level reviewer's signature and the  
13 warden/superintendent's signature. (Id.) The Director's level of  
14 review, which is the third and final level, is blank. (Id.)

#### DISCUSSION

##### I. Motion to Dismiss

17 The Prison Litigation Reform Act of 1995 (PLRA) amended 42  
18 U.S.C. § 1997e to provide, "No action shall be brought with respect  
19 to prison conditions under [42 U.S.C. § 1983], or any other Federal  
20 law, by a prisoner confined in any jail, prison, or other  
21 correctional facility until such administrative remedies as are  
22 available are exhausted." 42 U.S.C. § 1997e(a). Although once  
23 within the discretion of the district court, exhaustion in prisoner  
24 cases covered by § 1997e(a) is now mandatory. Porter v. Nussle,  
25 534 U.S. 516, 524 (2002). All available remedies must now be

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27       <sup>4</sup> The copy of the second 602 submitted by Plaintiff is a  
28 photocopy that is difficult to decipher; therefore, the log number  
could also be "SVSP-D-07-0522." (Amendment, Ex. A at 1-2, 602  
Appeal Form dated Dec. 26, 2007.)

1 exhausted; those remedies "need not meet federal standards, nor  
2 must they be 'plain, speedy, and effective.'" Id. (citation  
3 omitted). Even when the prisoner seeks relief not available in  
4 grievance proceedings, notably money damages, exhaustion is a  
5 prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741  
6 (2001). Similarly, exhaustion is a prerequisite to all prisoner  
7 suits about prison life, whether they involve general circumstances  
8 or particular episodes, and whether they allege excessive force or  
9 some other wrong. Porter, 534 U.S. at 532.

10 The PLRA's exhaustion requirement cannot be satisfied "by  
11 filing an untimely or otherwise procedurally defective  
12 administrative grievance or appeal." Woodford v. Ngo, 548 U.S. 81,  
13 83 (2006). "The text of 42 U.S.C. § 1997e(a) strongly suggests  
14 that the PLRA uses the term 'exhausted' to mean what the term means  
15 in administrative law, where exhaustion means proper exhaustion."  
16 Id. at 92. Therefore, the PLRA exhaustion requirement requires  
17 proper exhaustion. Id. "Proper exhaustion demands compliance with  
18 an agency's deadlines and other critical procedural rules because  
19 no adjudicative system can function effectively without imposing  
20 some orderly structure on the course of its proceedings." Id. at  
21 91 (footnote omitted); Jones v. Bock, 549 U.S. 199, 218 (2007)  
22 (compliance with prison grievance procedures is required by the  
23 PLRA to exhaust properly). The level of detail necessary in a  
24 grievance to comply with the grievance procedures will vary from  
25 system to system and claim to claim, but it is the prison's  
26 requirements, and not the PLRA, that define the boundaries of  
27 proper exhaustion. Id.

28 The State of California provides its prisoners the right to

1 appeal administratively "any departmental decision, action,  
2 condition or policy perceived by those individuals as adversely  
3 affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a).  
4 It also provides them the right to file appeals alleging misconduct  
5 by correctional officers and officials. Id. § 3084.1(e). In order  
6 to exhaust available administrative remedies within this system, a  
7 prisoner must proceed through several levels of appeal:  
8 (1) informal resolution, (2) formal written appeal on a 602 inmate  
9 appeal form, (3) second level appeal to the institution head or  
10 designee, and (4) third level appeal to the Director of the  
11 California Department of Corrections and Rehabilitation (CDCR).  
12 Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing  
13 Cal. Code Regs. tit. 15, § 3084.5). A final decision from the  
14 Director's level of review satisfies the exhaustion requirement  
15 under § 1997e(a). Id. at 1237-38.

16 Non-exhaustion under § 1997e(a) is an affirmative defense  
17 which should be brought by defendants in an unenumerated motion to  
18 dismiss under Federal Rule of Civil Procedure 12(b). Wyatt v.  
19 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, a complaint  
20 may be dismissed by the court for failure to exhaust if a prisoner  
21 "conce[des] to nonexhaustion" and "no exception to exhaustion  
22 applies." Id. at 1121.

23 In the present case, Defendant Oleachea correctly raised non-  
24 exhaustion in an unenumerated motion to dismiss. Defendant  
25 Oleachea argues that Plaintiff never submitted an appeal to the  
26 Appeals Coordinator's Office because his original 602 form "bears  
27 no date stamp, log-number, or marking in the upper right corner  
28 showing that the Appeals Coordinator's Office reviewed and

1 categorized the appeal." (Decl. Smith ¶ 7.) Defendant Oleachea  
2 further argues that Plaintiff did not exhaust his administrative  
3 remedies because he failed to "submit an inmate appeal to the  
4 Inmate Appeals Branch with a brief explanation of the reasons he  
5 believes the institution has improperly handled his inmate appeal."  
6 (Decl. Smith ¶ 10.)

7 Defendant Oleachea fails to acknowledge Plaintiff's second 602  
8 even though it has been given a log number and was signed by at  
9 least two different prison officials. Defendant Oleachea claims  
10 that a search of the SVSP tracking system was conducted, and  
11 "references to Frye were located and a computer printout of those  
12 results were generated." (Decl. Smith ¶ 6.) He states:

13 The computer printout comprises each and every inmate  
14 appeal submitted to the Salinas Valley Appeals  
15 Coordinators['] Office that was rejected or accepted  
16 for June 2003 to December 2008. The printout also  
comprises each and every appeal filed by Frye that has  
been screened-out, or rejected, at the First or Second  
Levels of Review from 2003 to 2008.

17 (Id.) The printout does not contain the original 602 or the second  
18 602. (Decl. Smith, Ex. A.) However, the record contains evidence  
19 which directly contradicts the information on the printout, i.e.,  
20 the second 602. Plaintiff claims that his second 602 was granted  
21 "without an attached letter for reasons." (Amendment at 2.) He  
22 also alleges that he "sent the original to the Appeals Coordinator  
23 with hopes to see why no Attached Letter to the 602, but I never  
24 got the Original 602 back." (Id. at 1-A.) The record indicates  
25 that Plaintiff, on his own accord and without any procedural  
26 guidance from the Appeals Coordinator's Office, sent three Inmate  
27 Request for Interview forms to the Appeals Coordinator requesting a  
28 response to his original 602 and second 602. Defendant Oleachea

1 fails to acknowledge these three Inmate Request for Interview  
2 forms.

3       The record shows that Plaintiff's second 602 was received by  
4 the Appeal Coordinator's Office on December 31, 2007. (Amendment,  
5 Ex. A at 1-2, 602 Appeal Form dated Dec. 26, 2007.) Although the  
6 second 602 was marked "Granted" at the second level of review,  
7 there is no indication on the form as to what actual relief was due  
8 to Plaintiff based on this grant. Because the Director's level of  
9 review is blank, it is arguable that Plaintiff did not appeal his  
10 claims to the highest level of appeal. However, there was nothing  
11 in the form explaining the next procedural step, if any, Plaintiff  
12 should have taken after receiving the grant, to exhaust his claims  
13 properly.

14       The obligation to exhaust persists as long as some remedy is  
15 available; when that is no longer the case, the prisoner need not  
16 further pursue the grievance. Brown v. Valoff, 422 F.3d 926, 934-  
17 35 (9th Cir. 2005). A prisoner need not exhaust further levels of  
18 review once he has either received all the remedies that are  
19 "available" at an intermediate level of review, or has been  
20 reliably informed by an administrator that no more remedies are  
21 available. Id. at 935; see also Marella v. Terhune, 568 F.3d 1024,  
22 1026 (9th Cir. 2009) (exhaustion is completed, regardless of the  
23 level of review, when an inmate is informed that the appeals  
24 process was unavailable to him).

25       In Brown, the administrative grievance was denied at the  
26 first formal level of review, and then partially granted at the  
27 second level. Brown, 422 F.3d at 930-1. Brown's appeal included a  
28 decision at the second level of review with the "P Granted" box

1 marked and an attached memorandum explaining the relief he would  
2 receive. Id. He was further informed that an investigation would  
3 be conducted and that he would be "notified by the Office of  
4 Internal Affairs of the disposition of [his] complaint . . . ." Id.  
5 Brown did not pursue the Director's level of review, instead  
6 he requested information from the California Office of the  
7 Inspector General about the status of the promised investigation.  
8 Id. In response, Brown was informed that an investigation had  
9 taken place but they refused to share specific details with him.  
10 Id. Brown then filed a civil rights action in federal court. Id.  
11 at 931-2. The district court found that Brown had properly  
12 exhausted because he "was provided all of the relief that the  
13 administrative process could provide." Id. The second level  
14 reviewer did not inform Brown that he could appeal the partial  
15 grant to the next level. Id. Therefore, the district court found  
16 that "it is unclear what would be left to appeal, as plaintiff's  
17 appeal was partially granted and an investigation was to be  
18 conducted." Id.

19 As in Brown, Plaintiff's second 602 was returned to him after  
20 it was marked "Granted" at the second level of review. Similarly,  
21 the second level reviewer did not inform Plaintiff that he could  
22 appeal the grant to the next level. Unlike in Brown, Plaintiff's  
23 second 602 was not returned with an attached memorandum explaining  
24 what relief Plaintiff would receive. The second 602 form included  
25 a space for Plaintiff to appeal to the Director's level of review;  
26 however, it was unclear what he had left to appeal because his  
27 second 602 was granted in full. Therefore, like Brown, Plaintiff  
28 had no further obligation to exhaust. See Brown, 422 F.3d at 934-

1 35.

2       Defendant Oleachea has failed to meet his burden of proving  
3 that Plaintiff did not exhaust all available administrative  
4 remedies.

5       Accordingly, Defendant Oleachea's motion to dismiss is DENIED,  
6 and the parties are directed to abide by the briefing schedule  
7 outlined below.

8 II. Motion for Reconsideration

9       Before the Court is Plaintiff's motion for reconsideration of  
10 the December 11, 2009 Order denying appointment of counsel.

11       Rule 60(b) provides for reconsideration only upon a showing  
12 of: (1) mistake, inadvertence, surprise or excusable neglect;  
13 (2) newly discovered evidence which by due diligence could not have  
14 been discovered before the court's decision; (3) fraud by the  
15 adverse party; (4) a void judgment; (5) a satisfied or discharged  
16 judgment; or (6) any other reason justifying relief. See Fed. R.  
17 Civ. P. 60(b). Subparagraph (6) requires a showing that the  
18 grounds justifying relief are extraordinary. Mere dissatisfaction  
19 with the Court's order, or belief that the Court is wrong in its  
20 decision, are not grounds for relief under subparagraph (6) or any  
21 other provision of Rule 60(b). "[T]he major grounds that justify  
22 reconsideration involve an intervening change of controlling law,  
23 the availability of new evidence, or the need to correct a clear  
24 error or prevent manifest injustice." Pyramid Lake Paiute Tribe  
25 of Indians v. Hodel, 882 F.2d 364, 369 n.5 (9th Cir. 1989) (quoting  
26 United States v. Desert Gold Mining Co., 433 F.2d 713, 715 (9th  
27 Cir. 1970)).

28       Plaintiff presents no grounds that warrant reconsideration.

1 As explained in the Court's Order denying appointment of counsel,  
2 there is no constitutional right to counsel in a civil case unless  
3 an indigent litigant may lose his physical liberty if he loses the  
4 litigation. See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25  
5 (1981); Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997) (no  
6 constitutional right to counsel in § 1983 action), withdrawn in  
7 part on other grounds on reh'q en banc, 154 F.3d 952 (9th Cir.  
8 1998) (en banc). The court may ask counsel to represent an  
9 indigent litigant under 28 U.S.C. § 1915 only in "exceptional  
10 circumstances," the determination of which requires an evaluation  
11 of both (1) the likelihood of success on the merits, and (2) the  
12 ability of the plaintiff to articulate his claims pro se in light  
13 of the complexity of the legal issues involved. See id. at 1525;  
14 Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v.  
15 Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Both of these  
16 factors must be viewed together before reaching a decision on a  
17 request for counsel under § 1915. See id. At present, the Court  
18 is unable to assess whether exceptional circumstances exist which  
19 would warrant seeking volunteer counsel to accept a pro bono  
20 appointment. Accordingly, Plaintiff's motion for reconsideration  
21 is DENIED. The Court will consider appointment of counsel later in  
22 the proceedings, after all Defendants have been served and have  
23 filed their motion for summary judgment and after the Court has a  
24 better understanding of the procedural and substantive matters at  
25 issue. Therefore, Plaintiff may file a renewed motion for the  
26 appointment of counsel after Defendants' motion for summary  
27 judgment has been filed. If the Court decides that appointment of  
28 counsel is warranted at that time, it will seek volunteer counsel

1 to agree to represent Plaintiff pro bono.

2 III. Review of the Amendment to the Amended Complaint

3 A. Fourth Amendment Unreasonable Search Claim

4 In the Court's July 6, 2009 Order, the Court found that  
5 Plaintiff stated a cognizable Fourth Amendment claim stemming from  
6 the strip searches by Defendant Oleshea. (July 6, 2009 Order at  
7 4.)

8 In his amendment, Plaintiff alleges that another Defendant,  
9 SVSP Correctional Officer Quitevis, participated in the unlawful  
10 strip searches, along with Defendant Oleachea, and taped  
11 Plaintiff's underwear to his skin. (Amendment at 3 ¶ 2-3.)  
12 Accordingly, the Court finds that Plaintiff has also stated a  
13 cognizable Fourth Amendment claim against Defendant Quitevis  
14 stemming from the strip searches. Therefore, this claim may  
15 proceed against Defendant Quitevis, who shall abide by the briefing  
16 schedule outlined below.

17 B. Eighth Amendment Claim

18 In its July 6, 2009 Order, the Court found that Plaintiff's  
19 allegations that SVSP prison officials deprived him of clothes, a  
20 mattress, basic sanitation products and utensils for forty-eight  
21 hours presented a cognizable Eighth Amendment claim for deliberate  
22 indifference to his basic life necessities. (July 6, 2010 Order at  
23 6.) However, Plaintiff's Eighth Amendment claim was dismissed with  
24 leave to amend because he identified "John Does" 1 through 6 as  
25 those who were present and participated in the deliberate  
26 indifference to his basic life necessities. (Id.) Because "a  
27 claim stated against Doe Defendants without further identifying  
28 information is not favored in the Ninth Circuit," see Gillespie v.

1 Civiletti, 629 F.2d 637, 642 (9th Cir. 1980), Plaintiff was  
2 directed to correct this pleading deficiency.

3 In the amendment, Plaintiff names the prison officials  
4 initially identified as "John Does" 1 through 6, who violated his  
5 Eighth Amendment rights, including: Defendants Oleachea and  
6 Quitevis, along with SVSP Correctional Captain Muniz; SVSP  
7 Correctional Lieutenant Showalter; SVSP Correctional Sergeants  
8 Nilssen and Watson; and SVSP Correctional Officers Mora, Corona,  
9 Greeson, Newby, White, Nolte, Lapurga and Milenewicz.<sup>5</sup> (Amendment  
10 at 15.) Plaintiff claims these Defendants "were deliberately  
11 indifferent as to the treatment Plaintiff as a prisoner receives in  
12 prison and the conditions under which he is confined, are subject  
13 to the Court[']s scrutiny under the 8th Amendment." (Id.)  
14 Plaintiff claims that Defendants Showalter, Nilssen, Muniz,  
15 Oleachea, Quitevis, Mora, Corona, White, Nolte, Lapurga and  
16 Milenewicz were present and participated in the deliberate  
17 indifference to his basic life necessities. (Id. at 5-11.)  
18 However, Plaintiff states that Defendants Watson, Greeson and Newby  
19 were only involved in the search of Ms. Frye. (Id. at 11.)  
20 Specifically, Plaintiff alleges Defendant Watson ordered Defendants  
21 Greeson and Newby to search Ms. Frye. (Id.) Plaintiff claims that  
22 their actions are in violation of the Eighth Amendment; however, he  
23 seems to be raising a violation under the Fourth Amendment based on  
24 an alleged unconstitutional search of Ms. Frye. Because Plaintiff

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25  
26 <sup>5</sup> Plaintiff inadvertently left out Defendant Watson from the  
list of Doe Defendants he identified; however, he names Defendant  
27 Watson as a defendant in the case caption and explains Defendant  
Watson's involvement in the alleged constitutional violation.  
28 (Amendment at 1-A, 11.) Therefore, the Court assumes Plaintiff  
intended to include Defendant Watson as a named Defendant.

1 fails to allege any facts linking these Defendants to a violation  
2 of his constitutional rights, his allegations do not state a  
3 cognizable Fourth or Eighth Amendment claim. Therefore, the Court  
4 DISMISSES without leave to amend Plaintiff's claim under either the  
5 Fourth or Eighth Amendment against Defendants Watson, Greeson and  
6 Newby.

7 Read liberally, the allegations in Plaintiff's amendment state  
8 a cognizable deliberate indifference claim against Defendants  
9 Showalter, Nilssen, Muniz, Oleachea, Quitevis, Mora, Corona, White,  
10 Nolte, Lapurga and Milenewicz. (Id. at 5-11.) Therefore, this  
11 claim may proceed against these Defendants, who shall abide by the  
12 briefing schedule outlined below.

13 C. Fourteenth Amendment Due Process Claim Related to "Feces  
14 Watch"

15 In its July 6, 2009 Order, the Court found that Plaintiff's  
16 allegations that he was not granted a hearing before or after he  
17 was put on "feces watch" state a cognizable claim of a violation of  
18 his due process rights. (July 6, 2010 Order at 9 (citing Meachum  
19 v. Fano, 427 U.S. 215, 223-27 (1976); Sandin v. Conner, 515 U.S.  
20 472, 484 (1995); Toussaint v. McCarthy, 926 F.2d 800, 1098 (9th  
21 Cir. 1990), cert. denied, 502 U.S. 874 (1991)).) However,  
22 Plaintiff's due process claim was dismissed with leave to amend  
23 because he identified "John Does" 1 through 6 as those who were  
24 present and participated in denying him a hearing. For the reasons  
25 stated above, Plaintiff was directed to correct this pleading  
26 deficiency.

27 In the amendment, Plaintiff names the prison officials,  
28 originally identified as "John Does" 1 through 6, who were present

1 and participated in denying him a hearing: Defendants Showalter,  
2 Nilssen and Muniz. Plaintiff alleges that Defendant Showalter was  
3 the "Official Watch Commander" who ordered Defendants Muniz and  
4 Nilssen to place Plaintiff on a "feces watch" without a hearing.  
5 (Amendment at 11.)

6 Read liberally, the allegations in Plaintiff's amendment state  
7 a cognizable due process claim against Defendants Showalter, Muniz  
8 and Nilssen. Therefore, this claim may proceed against these  
9 Defendants, who shall abide by the briefing schedule outlined  
10 below.

11 D. Fourteenth Amendment Equal Protection Claim Related to  
12 "Feces Watch"

13 In its July 6, 2009 Order, the Court found that Plaintiff made  
14 "the conclusory allegation that 'John Does' 1 through 6  
15 discriminated against him because of his race and his fiance's race  
16 by putting him on 'feces watch' in December, 2007." (July 6, 2009  
17 Order at 12.) The Court stated, "Plaintiff alleges no facts  
18 showing that similarly situated inmates, who are not African-  
19 American, or who have fiances of a different ethnicity, were not  
20 put on 'feces watch' in similar circumstances." (Id.) The Court  
21 found that Plaintiff did not state a cognizable equal protection  
22 claim against Defendants "John Does" 1 through 6 or Defendant  
23 Oleshea. Plaintiff's equal protection claim was dismissed with  
24 leave to amend "if he can allege in good faith, and by citing  
25 actual examples which are subject to proof, that Defendants 'John  
26 Does' 1 through 6 or Defendant Oleshea placed him on 'feces watch'  
27 but did not do so for other similarly situated prisoners of other  
28 races." (Id. at 13.)

In the amendment, Plaintiff simply reiterates the same allegations that were stated in the amended complaint. (Amendment at 21-23.) He fails to cure the pleading deficiency identified in the Court's July 6, 2009 Order. Accordingly, Plaintiff's equal protection claim is DISMISSED without leave to amend.

## CONCLUSION

7 For the foregoing reasons,

8       1. The Court DENIES Defendant Oleachea's motion to dismiss  
9 (docket no. 38). Defendant Oleachea is directed to abide by the  
10 briefing schedule relating to the motion for summary judgment  
11 below.

12       2. The Court DENIES Plaintiff's motion for reconsideration  
13 of the December 11, 2009 Order denying appointment of counsel, and  
14 DENIES as unnecessary his request for an extension of time to file  
15 an opposition to the motion to dismiss.

16 3. The allegations in Plaintiff's amendment state:

17           a.     a COGNIZABLE Fourth Amendment claim against  
18 Defendant Quintevis stemming from the strip searches conducted in  
19 December, 2007;

20               b.     a COGNIZABLE Eighth Amendment deliberate  
21 indifference claim against Defendants Showalter, Nilssen, Muniz,  
22 Oleachea, Quitevis, Mora, Corona, White, Nolte, Lapurga and  
23 Milenewicz; and

24 c. a COGNIZABLE Fourteenth Amendment due process claim  
25 against Defendants Showalter, Muniz and Nilssen.

26       4. The Court DISMISSES without leave to amend Plaintiff's  
27 claim under either the Fourth or Eighth Amendment against  
28 Defendants Watson, Greeson and Newby.

1       5. Plaintiff's equal protection claim is DISMISSED without  
2 leave to amend.

3       6. The Clerk of the Court shall mail a Notice of Lawsuit and  
4 Request for Waiver of Service of Summons, two copies of the Waiver  
5 of Service of Summons, a copy of the complaint and the amended  
6 complaint and all attachments thereto (docket nos. 1, 10) as well  
7 as a copy of the amendment to the amended complaint and all  
8 attachments thereto (docket no. 30), a copy of the Court's July 6,  
9 2009 Order, and a copy of this Order to: SVSP Correctional Captain  
10 Muniz; SVSP Correctional Lieutenant Showalter; SVSP Correctional  
11 Sergeant Nilssen and SVSP Correctional Officers Quitevis, Mora,  
12 Corona, White, Nolte, Lapurga and Milenewicz. The Clerk of the  
13 Court shall also mail a copy of the amendment to the complaint and  
14 all attachments thereto (docket no. 30) and a copy of this Order to  
15 Defendant Oleachea's attorney, Trace O. Maiorino at the State  
16 Attorney General's Office in San Francisco. Additionally, the  
17 Clerk shall mail a copy of this Order to Plaintiff.

18       7. Defendants are cautioned that Rule 4 of the Federal Rules  
19 of Civil Procedure requires them to cooperate in saving unnecessary  
20 costs of service of the summons and complaint. Pursuant to Rule 4,  
21 if Defendants, after being notified of this action and asked by the  
22 Court, on behalf of Plaintiff, to waive service of the summons,  
23 fail to do so, they will be required to bear the cost of such  
24 service unless good cause be shown for their failure to sign and  
25 return the waiver form. If service is waived, this action will  
26 proceed as if Defendants had been served on the date that the  
27 waiver is filed, except that pursuant to Rule 12(a)(1)(B),  
28 Defendants will not be required to serve and file an answer before

1       sixty (60) days from the date on which the request for waiver was  
2 sent. (This allows a longer time to respond than would be required  
3 if formal service of summons is necessary.) Defendants are asked  
4 to read the statement set forth at the foot of the waiver form that  
5 more completely describes the duties of the parties with regard to  
6 waiver of service of the summons. If service is waived after the  
7 date provided in the Notice but before Defendants have been  
8 personally served, the Answer shall be due sixty (60) days from the  
9 date on which the request for waiver was sent or twenty (20) days  
10 from the date the waiver form is filed, whichever is later.

11       8. Defendants shall answer the allegations in Plaintiff's  
12 amendment to the amended complaint in accordance with the Federal  
13 Rules of Civil Procedure.

14       9. The following briefing schedule shall govern dispositive  
15 motions filed by Defendants in this action:

16           a. No later than ninety (90) days from the date their  
17 answer is due, Defendants shall file a motion for summary judgment  
18 or other dispositive motion. The motion shall be supported by  
19 adequate factual documentation and shall conform in all respects to  
20 Federal Rule of Civil Procedure 56. If Defendants are of the  
21 opinion that this case cannot be resolved by summary judgment, they  
22 shall so inform the Court prior to the date the summary judgment  
23 motion is due. All papers filed with the Court shall be promptly  
24 served on Plaintiff.

25           b. Plaintiff's opposition to the dispositive motion  
26 shall be filed with the Court and served on Defendants no later  
27 than sixty (60) days after the date on which the aforementioned  
28 Defendants' motion is filed.

1                   c. If Defendants wish to file a reply brief, they shall  
2 do so no later than thirty (30) days after the date Plaintiff's  
3 opposition is filed.

4                   d. The motion shall be deemed submitted as of the date  
5 the reply brief is due. No hearing will be held on the motion  
6 unless the Court so orders at a later date.

7                   e. Defendant Oleachea, who has previously been served,  
8 has been told that discovery may be taken in this action in  
9 accordance with the Federal Rules of Civil Procedure. Leave of the  
10 Court pursuant to Rule 30(a)(2) is also hereby granted to the other  
11 Defendants to depose Plaintiff and any other necessary witnesses  
12 confined in prison.

13                  f. As Plaintiff has been instructed to do so with  
14 Defendant Oleachea, all communications by Plaintiff with the Court  
15 must be served on the other Defendants, or these Defendants'  
16 counsel once counsel has been designated, by mailing a true copy of  
17 the document to their counsel.

18                  10. Defendant Oleachea's name was misspelled as "Oleshea" in  
19 the Court's July 6, 2010 Order. The Court directs the Clerk of the  
20 Court to correct the spelling of his name in the case caption to  
21 "Oleachea."

22                  11. This Order terminates Docket nos. 38 and 43.

23                  IT IS SO ORDERED.

24 DATED: 9/28/2010

  
CLAUDIA WILKEN  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

KARLOS L FRYE,

Plaintiff,

Case Number: CV08-05288 CW

V.

OLESHEA et al,

Defendant.

## **CERTIFICATE OF SERVICE**

7 OLESHEA et al,  
8 Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on September 28, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located  
in the Clerk's office.

15      Karlos L. Frye T05458  
D7-129  
16      Salinas Valley State Prison  
P.O. Box 1050  
17      Soledad, CA 93960-1050

18 | Dated: September 28, 2010

Richard W. Wieking, Clerk  
By: Nikki Riley, Deputy Clerk